

Sharing Child Custody: Co-parenting After Divorce in Spain

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Abstract

Cooperative parenting after separation and divorce in Spain has been introduced with claimed gender neutrality although its application seems to invoke the two-parent heterosexual family ideal that requires genetic truth, surname and residence to be preserved. Legislative developments and legal ordering revolving around joint physical custody and shared residence in this Mediterranean country have taken place within a context of relevant social changes. The aim of this contribution is to demonstrate that divorce law reform has assumed that father and mother share parental responsibility equally, without raising the practical issue of gender role prevalence in physical day-to-day care. Literature on family studies has been reviewed from disciplines such as social anthropology, sociology, political science and law, providing socioeconomic data from primary and secondary sources.

Key words

Divorce; Child Custody; Shared Residence; Co-parenting; Gender Equality; Spain

Resumen

La coparentalidad tras separación o ruptura conyugal en España se ha introducido desde la demanda de una neutralidad de género aunque su puesta en práctica parece invocar al ideal de la familia biparental heterosexual que requiere mantener la verdad genética, el apellido y la residencia. Los desarrollos legislativos y el ordenamiento jurídico en torno a la custodia compartida en este país mediterráneo han tenido lugar en un contexto de cambios sociales muy importantes. El propósito de esta contribución es demostrar que la reforma de la ley del divorcio asume que padre y madre comparten responsabilidades parentales de modo equitativo, sin haber considerado la prevalencia de los roles de género en la práctica del cuidado físico y la atención cotidiana. Se ha revisado la literatura sobre estudios de familia desde disciplinas como la antropología social, la sociología, la ciencia política y el derecho y se han tenido en cuenta datos socioeconómicos de fuentes primarias y secundarias.

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Palabras clave

Divorcio; responsabilidad parental; custodia compartida; coparentalidad; igualdad de género; España

Table of contents

1. Introduction 1232

2. Changes in the family and the weight of tradition 1232

3. From absolute paternal power to shared parental authority..... 1234

4. Custody, guardianship and parental responsibility after divorce 1236

5. Joint custody, physical care and shared residence..... 1237

6. The real practice of agreements on joint custody and shared residence 1240

7. Conclusions..... 1242

References..... 1243

1. Introduction

Do the images of kinship enshrined in legal codes and statutes really reflect the way social subjects understand relatedness? In this respect, this contribution asks the question of how far legal joint custody orders in Spain reflect how social subjects understand the parent-child relationship. More specifically, it asks whether the principles of the child's best interest and shared parental responsibility governed by Spanish law are applied gender-neutrally in agreements made between fathers and mothers after separation or divorce.

Current social and legal discourse in Spain refer literally to joint custody and co-parenting as a way of indicating not only legal custody and guardianship but shared planning regarding day-to-day care of dependent children. By looking at the main demographic and socioeconomic transformations that have taken place in Spain since the democratic transition, this work will analyse legal developments regulating the relationship between parents and children, marriage and divorce. Interest has focused on contrasting the application of legal regulations against social practice, looking closely at how legal definitions have evolved relating to parental rights and responsibilities after separation and divorce, such as parental authority, parental responsibility, custody and the possibility of shared residence.

The aim of this work is to analyse transformations in gender relations that accompany the legislative development in terms of parental responsibility in Spain around two hypotheses. The first hypothesis assumes that father and mother share parental responsibility equally, without questioning the complementary nature of gender roles. The second hypothesis is derived from the first and highlights that co-parenting after divorce is implemented in a system that seems to reinstate the ideal of the hegemonic *pater familias* figure within the heterosexual two-parent nuclear family.

The methodology has followed the literature review on family studies from disciplines such as social anthropology, sociology, political science and law. It includes data from socioeconomic indicators working from primary and secondary sources.

The first part of the work describes changes that have taken place in how families are formed and their structure in Spain since the democratic transition in the 80s. The second section shows the journey represented by changes in legislation from *patria potestad* (absolute paternal power) to shared authority between father and mother. The third section specifically tackles the parent-child relationship after a divorce, developing concepts relating to custody, care and shared responsibility. The fourth part deals with how joint custody denotation has evolved towards meanings related to shared residence. The fifth section gathers learning from real practice on these legal arrangements and how they are applied in referential countries. Although Spain is the case in point, documentation has been used from other countries such as France, the United Kingdom, Australia, the United States, and Norway in order to contrast contents of the regulations at the historic moment they were introduced.

2. Changes in the family and the weight of tradition

Ways of being a parent and family composition in Spain have undergone an obvious transformation since the 80s. Some of the most significant changes regarding gender relations concern marriage, divorce and the provider-nurturer dichotomy.

Since 1980, the average age for a first marriage has risen from 24 to 32 years old among women. Among younger generations, marriage has been displaced by living together as a couple as a means of emancipation. New dynamics can also be seen in terms of how homes are organised internally regarding how responsibilities are divided up. In most two-parent homes, men and women appear as wage-earners according to census data from 2011 (Castro Martín and Seiz Puyuelo 2014).

As far as divorce is concerned, taking into account that the first law regulating it after Franco's dictatorship was applied in 1981, it is significant that the divorce rate in

Spain for 2012 was above the European average (EU-28), according to Eurostat (2017a) data. It should also be emphasised that this indicator does not include dissolving civil partnerships that were never officially registered. These splits are followed by new partnerships, some of which remain hidden, as second partnerships tend to prefer living together over marriage. In any case, one in every five current marriages in Spain is a second marriage for one of the partners. In accordance with data on marriage duration for 2007, "One can expect that almost 6 out of 10 marriages will end in divorce in Spain" (Spikjer and Solsona 2012, 32). Divorcees in Spain marry again in a higher proportion than the European average. Men tend to marry sooner, mainly with younger women, a higher proportion of whom have never married. Women take more time to marry again if they eventually do so, given that almost 50% never remarry (Spikjer and Solsona 2012). We could see a certain pattern of serial polygamy for men that is not as frequent among women.

Regarding participation from men and women in what is considered to be earning money, it seems that the traditional family, with a prevailing division of roles between men and women, is on the decline. However, its journey towards the dual earner model is not clear-cut as financial contributions by men and women are not balanced and clear data cannot be appreciated regarding equal division of duties and responsibilities in the care-providing field (De Villota 2008, Campillo 2010).

Marriage has lost its grip as the family's guiding principle but it should be highlighted that living in a couple continues to be the norm in Spain, bound to the procreative project. Comas-d'Argemir (2007) qualifies the changes in Spanish families over the last few decades as a revolution. The key factor for these changes was a radical transformation of gender relations within the framework of democratic development, individual freedoms and social rights. This could only happen from the 80s onwards, as part of the democratic transition following 40 years of General Franco's Catholic-Nationalist dictatorship. As a result, almost four decades later, we have new ways of organising families thanks to developing individual freedoms and redefining what having children represents within this new framework.

Over the last few decades, family has undergone a true revolution: a decline in marriage and an increase in informal relationships, fragile marital relations, the development of single parent and step families, and new same-sex parenting. The family of 2007 is quite different from families that existed in Spain just forty years ago. In countries such as France, Germany or Sweden such changes began earlier, sustained by a context of democratic freedoms and welfare states that promoted social and family policies (Comas-d'Argemir 2007, 3).

The preference for establishing informal partnerships and the fragility of matrimonial ties has changed the very nature of the institution of marriage. Apparently, marriage has become less valid in the organisation of kinship but the new role of infancy and parental responsibility seems to indicate that it is the arrival of children that institutionalises the family today. Filiation has become the central axis regulating parenting and kinship.

Despite the above, Cadoret (2011) highlights the symbolic persistence of the heterosexual couple consecrated through marriage and the progenitor family. It can be seen that ever since the origins of Christianity, via the Roman Order, and the Enlightenment, this cultural model is now reasonably predominant in societies north of the Mediterranean.

Although the recession that took hold in Spain at the end of 2008 affected male employment more, data from the 2011 Census (Instituto Nacional de Estadística (INE) 2011) indicates that only the man has a job in 27.8% of homes (Castro Martín and Seiz Puyuelo 2014). In almost a third of homes, the father is the only provider. This provider-father is a prevalent value as is the child-minding mother. Results from the Sociological Research Centre barometer produced in March 2014 (CIS 2014) show that caring for 3 year olds falls to the mother in 82% of cases, with the

grandmother as the second option with 7.5%, ahead of the father who does it in 4.8% of cases (CIS 2014). According to this data, it cannot be said that Spain has achieved a gender balance in the distribution of paid work and care.

In truth, we can state that the shape of families and how homes are run in Spain has been modified but in the same way, we can say that there are prevalent models. As asserted by Strathern (2005, 23), "The traditional and non-traditional exist side by side". The explanatory framework remains in a dichotomous logic scheme that measures how people participate in two opposing spheres: public/private, production/reproduction. The couple prevails as the most usual form of emancipation. This couple is heterosexual by default, where the woman is younger, has fewer ties to the family's productive means and greater ties to raising children and remarries less than the man. Responsibilities continue to be measured in two separate spheres: economic/domesticity, employment/care. We can say that the heterosexual two-parent family has been reinvented in the midst of dynamic procreative frameworks.

In this respect, the scientific community responsible for interpreting these social transformations has had to take a fresh look at its approach to studies on kinship and family. Following Schneider's criticism of kinship studies in anthropology, Rivas (2008) highlights that parenting realities over the last few decades have raised challenges looking at problems concerning concepts assumed to be founded in constructing identities tied to family life. These challenges that are now being raised include wondering about the instability of some meanings that until now have been considered as the defining condition and essentially characteristic of family life such as living together, married life and the certainty of blood relations.

For González *et al.* (2010), the anthropology of kinship today represents a sociocultural theory of procreation that, in its substantial definition, includes raising children and attributing responsibility for this up to social maturity of human beings in the replenishment process. This theoretical positioning includes different fields relating to the study of organising sexuality and procreation in new family configurations.

Although critics of classic kinship studies do not seem to be so interesting within French anthropology, Segalen (2012) indicates that parenting studies have also changed focus in the French-speaking world. This field of study has multiplied and diversified to the extent that ethnographic attention is no longer focused on describing what happens in exotic places but on investigating how family relationships are constructed in complex societies interpreting their scope as cultural systems in themselves. This explanatory turn implies the concurrence of a whole series of research projects from disciplines such as social anthropology, sociology, social politics, psychology or law. So, over the last twenty years we have appreciated the boom of the socio-demographics and anthropology of the modern family with works that looked mainly at what Segalen called *inventions of parenting*. Many of them emerge from consequences linked to the increase in marriage breakdowns and subsequent family blending. Another part includes emerging or unprecedented configurations such as LGBTQI parenting, childless/child-free women, and derivations of assisted reproduction. A minority although growing trend includes how to be a parent after divorce and also being a sole parent.

3. From absolute paternal power to shared parental authority

As we have seen, the study of the dynamics and the recent development of the diversity of family life help us appreciate how relations have evolved between men and women (Comas-d'Argemir 2007, Segalen 2012). If we consider childcare management as an increasingly valuable asset, it is interesting to ask ourselves why women in European societies seem to choose careers that distance them from maternity (Badinter 2011), whilst men seem to be increasingly closer to the

procreative scene as active subjects of new forms of exercising paternity (Escobedo *et al.* 2012).

We should ask what a parent really is and how much this has to do with marriage and maternity and paternity. From a legal point of view, a child born in Spain can be registered as a citizen on the Civil Register in two different ways, as a child born in wedlock or out of wedlock. If this is a marriage between people of the opposite sex, the declaration of one of the parents directly indicates that presumption of the father and mother's legal paternity or parentage of the new born child. However, if this is a child born out of wedlock, and the mother has been married before, the legal presumption of paternity falling to the previous husband must be ruled out and the relevant certification of marriage and witnessed divorce certificate must be provided. If the mother had been in a civil partnership before, this presumption of paternity for the husband does not exist and it would be sufficient for her to provide two people testifying the type of filiation of the child (Ministerio de Justicia 2016). In a similar way, in the United Kingdom and according to the Children Act 1989, at least up to the nineties: "Where the mother and father are unmarried they will both be parents but only the mother will, initially at least, have parental responsibility (Bainham *et al.* 1999: 27).

Despite the fact that 42% of births in Spain in 2012 according to Eurostat (2017b) took place outside marriage, this institution remains key in categorising the Civil Register entry record as the notion of a legal person in this country. For this same reason, we might interpret that it is increasingly frequent to find that paternity is not a given fact and must be declared. This new situation could explain a new scenario where some men are acting as subjects demanding a visible place through fathering.

The displacement of marriage as the axis for filiation, along with the development of legal regulations required by new assisted reproduction techniques have forced the question of what a parent is. This has led to a review of concepts such as parentage, parenthood and parental responsibility.

One distinction then between parentage and parenthood, at least as a matter of everyday language, may be that the former, but not the latter, is an exclusively genetic idea. But this is not, in my view, the only point of distinction. Parentage, I suggest, has a "one-off" character. It is about genetic truth, or at least a presumed genetic link—as in marriage. (Bainham *et al.* 1999, 29).

Parentage therefore goes back to the original, the ancestral aspect, the uniqueness. Its content is enclosed in metaphors that right now are encapsulated within the framework of genetics, something that is strangely presumed and given as fact in the case that father and mother have been joined in marriage. Subsequently, the meaning of parenthood would be displaced to a subsidiary role, tied to the social role of being a father or a mother. Finally, parental responsibility meets a legal technical concept that is assigned to determine who is legally responsible for a minor. This status automatically falls to the father and mother when they are married and only to the mother when the minor is born outside of wedlock. In the latter case, it is usual to find that, for example, the maternal grandparents appear to take on parental responsibility for their adolescent son or daughter, something that is not conveyed to the other parent unless the relevant declaration of parentage has been made.

In Spain, the concept of shared parental responsibility has recently substituted *patria potestad* (absolute paternal power) that nowadays can be described as parental authority. Parental authority in Spain takes its inspiration from *patria potestas* from Roman Law, found subsequently in the Napoleonic Code. The latter is also known as the 1807 French Civil Code that introduced regressive reforms in terms of equalling rights between men and women and whose influence was extended to later civil codes in Spain, Portugal and Italy.

In a similar way as indicated by regulation of parental authority in the United Kingdom up to 1925, based on absolute paternal power, in Spain the father also had absolute

authority over his children. The Spanish Civil Code in 1889, in Art. 15, stated: "In all cases, the woman will follow the condition of the husband, and the non-emancipated children that of their father and, failing that, their mother." In accordance with García-Presas (2011), the institution of parental authority in Spain underwent a remarkable transformation throughout the 20th century. On the one hand, its very nature was modified as it went from being considered as power and authority to constituting an obligation and a responsibility that the law imposes on whoever exercises it. It was not until 1981, with the first divorce law after Franco's dictatorship, that parental authority lost its *pater familias* character of patriarchal prerogative, becoming an obligation and responsibility for the children that should be shared between father and mother.¹

This new acceptance of parental responsibility seems to be in tune, on the one hand, with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),² and on the other with the development of standards in countries such as France and the United Kingdom where shared parental authority had already been regulated the previous decade. In 1970, the French Law of Parental Authority equated the rights and responsibilities of father and mother. In the United Kingdom, the Guardianship Act of 1973 equated the authority and parental rights of father and mother: "a mother shall have the same rights and authority as the law allows to a father".

4. Custody, guardianship and parental responsibility after divorce

The 1981 Spanish law regulating at fault divorce breaks with absolute paternal power and recognises authority, responsibility and equal rights for father and mother after dissolving marriage ties. Although the law is written in neutral gender terms, in its application, apart from exceptions, the children stay with the mother. The custody and guardianship of the children is awarded to the mother, with the father having the right to a visit arrangement. In article 97, the aforementioned law indicates that compensation has to be set for the spouse "when, on separation or divorce, an economic imbalance related to the position of the other occurs that implies a worsening of their prior situation in the marriage." In practice this has been understood as protection for the spouse who must be compensated for "past and future dedication to their family." This compensation is independent of child support and it is withdrawn if the ex-partner cohabits with a new partner.

Social practice in Spain in the early 80s painted a picture in which the children remained with the mother after a divorce and occasionally a maintenance allowance might be set for the woman. It should be considered that a period of 40 years of dictatorship was coming to a close where women were considered to be minors under the guardianship of their father or husband.

At the same time that the preference for maternal custody, understood as mother residence, took hold in Spain, this presumption that the mother was suitable to take care of under-age children after a divorce was already being questioned in the United States. This was stated in a study in the 80s on the incidence of the Joint Custody Reform:

¹ Law 11/1981, dated 13th May, modifying the Civil Code in terms of filiation, parental authority and the economic marriage regime. Art. 156. Parental authority will be exercised jointly by both parents or by just one with the express or tacit consent of the other. It should be mentioned that there was a prior regulation on divorce in 1931 during the Second Spanish Republic that was derogated after the military coup in 1939. This was a divorce law based on fault that proclaimed equality between men and women as stated in article 43 of the 1931 Constitution: "The family is under the special safeguard of the State. Marriage is founded on equal rights for either sex, and can be dissolved by mutual dissent or on request from either spouse with the allegation in this case of just cause."

² Article 16 of the CEDAW: "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women".

Child custody law in the United States has evolved from the early European concept of absolute paternal power, to a presumption that the mother should be granted custody of young children, to the current standard, which dictates that the custody award be made in the best interests of the child (Charlow 1987, 268).

As indicated, until 1925 English law awarded the custody of the children to the father, partly following the Roman practice of preference for paternal custody and understanding that as the children were potential workers, the father would be in a better economic position to guarantee their upkeep (Goldstein 2016). At the same time, the tender years doctrine was being put through, introduced by the British Parliament through the Custody of Infants Act of 1839 that allowed the custody of minors aged under four years old to the mother after divorce when adultery had not been proven.³ Later modifications extended this doctrine up to the age of 16 and with it, as argued by Caetano (2012), the myth of maternal love was reinforced and the provider-nurturer dichotomy in cases of post-divorce custody.

Spain had to wait two decades for the reform of its first divorce law from 1981. This new law in 2005 introduced the figure of the guardian for the first time plus shared custody of the children.⁴ This law eliminated the no fault divorce cause and the requirement for prior separation. During the period of time between these two laws, the social context had changed substantially, particularly referring to men and women both going out to work. The employment rate between 1980 and 1995 moved in opposite directions for men and women. The male employment rate dropped 10 points, from 72 to 62% whilst the female rate increased by the same proportion, from 28 to 38% (Puy Cabetas 2000). Data from 1995 onwards indicates that the male rate held steady until 2000, increasing to more than 68% in 2005. On the other hand, the female rate kept on growing steadily up to 46% at the end of 2005. In any case, it should be emphasised that the gender gap regarding employment rates in 2005 was 22 percent.⁵

The female activity rate underwent a significant increase in this period, particularly due to the effects of economic development and convergence with the EU that required an increase in active population, particularly incorporating women into the workplace. This was possible due to growing female immigration, mainly from Latin America, replacing native women in domestic and care tasks (Fernández-Rasines 2003).

When speaking about separation and divorce, it is worth stating that when dependent children are involved, in Spain all separating parents must go before a court to obtain judge-determined arrangements. This is required even though more than half will break up by mutual consent with a parenting plan agreement.

5. Joint custody, physical care and shared residence

Defining shared parenting nowadays is the result of a wide terminology constructed in different national settings through last decades. For the United Kingdom, shared parenting now refers to an equal division of time for children with either parent. It has no legal status and differs from the legal term, parental responsibility. Besides, designations like joint physical custody, dual residence, alternating residence and shared physical placement are all used in the United States to describe shared time

³ The tender years doctrine originates from protests by Caroline Norton (circa 1838) who, having been affected as a divorced mother and refused the custody of her children, managed to bring about the social debate in England leading to a reform of the marriage and divorce law to abolish absolute paternal power (Caetano 2012).

⁴ Law 15/2005, dated 8th July, modifying the Civil Code and the Civil Procedure Law on separation and divorce.

⁵ According to data from the Women and Equal Opportunities Institute, Spanish Government. Data for 2014 indicates a male employment rate of 68% and a female rate of 53% (Instituto de la Mujer y para la Igualdad de Oportunidades e INE 2016).

arrangements for daily care. Shared parenting seldom means a 50/50 timeshare and most commonly defines shared parenting time between 30% and 50% of the time.

Spanish construction of the related terminology has been built mainly upon French and Anglo-Saxon legal discourses. The aforementioned Spanish law from 2005 regarding separation and divorce introduces the concept of shared responsibility although it also refers to the *power*, understood as parental authority. This law opened up the possibility of shared guardianship and custody, along with day-to-day care for the first time. In its conclusion on the presentation of reasons, it states that:

(...) parents should decide if the guardianship and custody is given to one of them or shared between the two. In any case, they will determine, to the minor's benefit, how the child will relate in the best way possible with the parent that does not live with them and they will attempt to follow the principle of co-parenting when exercising the authority. (Ley 15/2005)

We now turn to France as the principle of co-parenting appears in French legal discourse in the legal reform of 2002 that, although replacing the term guardianship with parental authority, in practice introduced the preference for what has become known as alternating custody (*garde alternée*) after divorce (Loi n° 2002-305 du 4 mars 2002, Lathrop 2009). This principle appears bound to the concept of co-parenting that requires a redefinition of marriage. Co-parenting allows a dual contract to be introduced into marriage: conjugal and parent-child. The conjugal contract might be dissolved whilst the parent-child contract has to be preserved.

In this new scenario, spouses would recognise a progressive individual autonomy through the phenomenon known as *démariage*, in French, or the legislative trend to streamline both enacting and dissolving the conjugal union. On the other hand, it is foreseeable that when children are involved, this individual autonomy should be made compatible with the commitment to maintain a cooperative relationship between ex-spouses, at least until the children have left home. The *démariage* phenomenon arrived in Spain with the 2005 law that, little wonder, became known popularly as the Express Divorce Law and that introduced the joint custody as shared parenting arrangement.

Following the historical development of the joint custody arrangement, we can see that in the United States, legislation introducing it was underway the 1970s (Halla 2009). Indiana was the first State to implement it in 1973 and in the following two decades, the majority of States reformed their legislation in this respect. The legislation distinguishes between joint legal custody and joint physical custody. The former indicates that father and mother share rights and duties involved in raising children such as decisions regarding education, health, religion and any others that are considered important in their context. The second implies time invested and supposes that father and mother share their time significantly with the children.

It should be highlighted that in the United States, cooperative relations post-divorce should be guaranteed for the best interest of the child.

Joint custody means more than a sharing of physical custody, as parents must share the responsibility for the child's upbringing. Both parents are to be consulted on major decisions, and each might veto the other's decisions. This contemplates a cooperative relationship after divorce and also means that a husband who pays child support can better see how his money is spent under joint custody (Brinig and Buckley 1998).

Some arguments in favour of joint custody come from economic analysis demonstrating that the vulnerability of single parent families is reduced as this mitigates the effect of child support not being paid by fathers who are distanced due to lack of contact. As indicated by the study by Allen *et al.* (2011), delinquent child support has been a controversial political problem in the United States insomuch as benefits for single mothers represent a significant draw on resources. Consequently,

they conclude that the joint custody reform particularly benefited divorced women with children who did not receive public aid.

Returning to the Spanish case, Alascio and Marín (2007) analysed the effective application of the 2005 law from its legal and economic foundations. They argue that implementing this arrangement has immediate economic effects given that housing is not going to be automatically or preferentially allocated to just one ex-spouse and nor will child support be assigned as had been usual under the previous law. Difficulties for its practical application were highlighted by the high economic cost of its maintenance, as well as the risk of failure if a sustained cooperative spirit could not be guaranteed between ex-spouses. These authors define joint custody as a modality that involves both parents performing parental functions alternately, bringing it closer to the content of the arrangement or alternate residence or *garde alternée* resulting from the French Law of 2002. We can see that this cannot be literally translated to indicate what joint custody means in Spain.

Soon after passing the 2005 law, mothers would continue to be given exclusive guardianship and custody of the children, understood as day-to-day care, in the vast majority of cases. From this moment on, a gradual trend, albeit minor, was observed that extended the joint custody model (Guilarte 2008). Data from the Spanish National Statistics Institute for 2010 (INE 2012) indicates 83.2% of attributions of exclusive custody to the mother, 5.7% exclusive to the father and 10.5% for "both", that can be interpreted as joint custody. Data from 2014 (INE 2015) shows that custody for both has doubled reaching 21.2%, exclusive custody to the father has dropped to 5.3% and above all exclusive to the mother, although this continues to be majority, with 73%.

What the sentences compile as allocation of guardianship and custody for both parents is what is assumed to be joint custody. Judges must justify the sentences based on defined criteria. Novo *et al.* (2013) analyse these criteria that might give information on the relationship between certain parental abilities and gender. This shows that the suitability of a father or a mother to assume custody after a divorce would be related to factors such as: 1) performing the care on a regular basis, 2) availability of time, 3) encouraging full development and effectively satisfying the children's needs, 4) support from the extended family, 5) demonstrating better conditions or suitability and 6) demonstrating positive character traits. It is significant that the last three criteria appear in the study particularly associated with reasons for sentences that award exclusive custody to the father.

After stating the relative incidence of implementation of the figure of joint custody in Spain after the 2005 law, Varela (2012) reviewed the legislation in European countries and concludes that at the end of the first decade of this millennium, joint custody is the primary option in Belgium and Italy. It can only be requested by mutual agreement between parents in Germany, Norway and Portugal. Finally, it appears as a possible option in the majority of countries such as France, England, the Czech Republic, Denmark, Finland, the Netherlands and Sweden.

In relation to this, it has also been seen for the Spanish case that gender bias characteristics in the job market and the workplace mean that men come across important obstacles when requesting parental leave for example. As indicated by Lapuerta (2013) in his work on the use of leave for childcare in the different regions of Spain, data shows that none of the policies implemented for conciliation has an effect on possible increase of use by men. As asserted by Tobío (2012) "there are three major types of obstacle that make it difficult for men to devote themselves to care related to knowing, being able and wanting to" (Tobío 2012, 417). So far, work-life conciliation in Spain has fallen to women.

Despite the evidence, the Spanish Minister of Justice requested a modification to the Civil Code in June 2012 to promote joint custody in cases of divorce assuming shared parental responsibility was already a fact in our society. The minister at the time

explained that "it is the Government's responsibility to be alert to changes that are taking place in society, including any happening in the structure of Spanish families where fathers and mothers share responsibilities equally" (Ministerio de Justicia 2012). He also added that, in his opinion, language should evolve so that *patria potestad* (parental authority) should give way to discourse on the concept of co-parenting just as "guardianship and custody" should be replaced by "physical care and shared residence". The minister envisaged that a legislative reform in this respect should be ready within six months and the government thereby approved the draft bill in July 2013 on exercising co-parenting in the event of nullity, separation and divorce. This legislative initiative claims to eliminate the exceptional nature of joint physical custody and requires planning of shared parenting although it is still being processed.⁶ In the meantime, some regions with authority in terms of family law have been making their own reforms tending towards promoting joint physical custody. This has been done in Aragon, Navarre, the Valencia Region, Catalonia and the Basque Country.

Given the absence of national legal regulation, the courts have been defining a custody model that is shaped by jurisprudence. Thus, the Constitutional Court judgment 185/2012, of 17 October, establishes that shared physical custody should be considered "normal and not exceptional". A year later, the Supreme Court set a trend with judgment 758/2013 of November 25, noting that shared custody is considered as the 'normal and even desirable' measure. In 2016, this high court, in judgment 194/2016 of March 29, unequivocally states that it will be necessary to follow the doctrine marked in this regard (Gómez 2016).

6. The real practice of agreements on joint custody and shared residence

As has been already stated, it is problematic to compare different administrations and so the terminology given to arrangements involved in post-divorce co-parenting are diverse. Each term can have different meanings depending on the social and cultural context. Here, we follow some studies gathering data from experiences in France, UK and Wales, Australia, the United States, and Norway. Unexpectedly, matrifocal residence appears as the most common and stable pattern in different contexts after divorce.

It does not seem relevant to compare what has been understood as joint custody in the United States since the 1970s with what France has called alternating custody since 2002 or the joint custody that appeared in Spain from 2005 onwards. In the event of attempting a comparison, firstly, it would be necessary to weigh up which part corresponds to the distribution of authority, rights, responsibility, time, money, the house, among other aspects. Secondly, some parameters would have to be set that define the compared contexts such as the incidence of marriage and divorce, vulnerability of single parent families, family support policies and indicators of equality between men and women, among others.

As stated in the introduction, when current discourse in Spain refers to joint custody, this implies not only shared legal custody and guardianship, but cooperative parenting regarding day-to-day care, along with shared/alternated residence for children (Fernandez-Rasines 2016).

For the case of England and Wales, Trinder (2010) indicates that shared residence is becoming more relevant although it is still very infrequent given that the majority of minors continue living mainly with their mothers. This author has reviewed the data that suggests that this type of agreement can be positive if the parents are capable of cooperating. The study concludes that taking on shared residence as a preferential

⁶ In the opinion of some family judges who were interviewed, it was not possible to adopt a national shared custody law during the past term due to social pressure from the interests of some civil associations (Gómez 2016). It may be argued that reverse pressure could have influenced the subsequent jurisprudential drift.

option in England and Wales, following recent experience in Australia, can lead to its application in disputed cases with high conflict between the parties, which it considers to be a mistake.

Summarizing existing research findings, focused mainly on experience in Australia, it can be concluded that shared parenting works well for children after separation when parents cooperate, are flexible and able to put the child's need first. On the contrary, problems can arise when parents are highly conflicted, and where the child is under 4 years (University of Oxford 2012).

Australian Family Law Act 1975 refers to sharing not just equal but substantial time with either parent. After 1995 amendments, it seems that mother-residence was the most common and stable pattern after separation and divorce for the period 2001-2004. Not only was it the most common agreement but it was also the pattern to which other less common agreements gravitate, especially dual-residence (Smyth *et al.* 2008). These findings were reportedly consistent with data from the United States in the nineties although data updates may have shown changes since family law reform in 2006 moving towards much greater emphasis on encouraging shared parenting (Fehlberg *et al.* 2011).

Without attempting to establish comparisons, it is interesting to monitor the French case due to its proximity to Spain. Masardo (2011) expresses that in the two weeks following the legal reform coming into force in 2002, introducing the specific option of alternating custody in France, more than 75% of agreements granted weekly alternate residence. Beyond the quantitative incidence, Cadolle (2007) investigates daily family life in this country and even talks about a new form of matrifocality that emerges due to the weight of structural factors despite all the legally agreed adjustments. According to this author, it can be appreciated that there has barely been a lessening in the distribution of gender roles when sharing parental responsibilities. Employment and economic activity surveys show that women are, effectively, active in formal paid work but this does not reduce the time they spend on childcare. It has been seen that mothers spend between two and three times more time on childcare and attention than fathers who continue to invest more time and dedication in their professional careers (Cadolle 2007). A later study by the same author demonstrates that the ideal of co-parenting, whilst claiming to encourage greater equality between fathers and mothers, has actually led to a new asymmetry between men and women.

In this case, it is shown that the step-mothers usually take responsibility for the housework and childcare to a greater extent than fathers and step-fathers (Cadolle 2013). Along the same line, Bessière *et al.* (2013) shows how a decade after introducing the legal measure in France, social reality indicated that minors living with the mother is imposed independently of the details of the judicial resolution. It seems that alternate residence is only accessible for parents, and specifically mothers, who have stable professional positions, given that anyone with a more vulnerable position cannot tackle its requirements in daily practice.

The debate on shared custody in Spain has little to do with promoting new styles of fathering or more equal sharing of family responsibilities. Flaquer (2012) stresses that it is not possible to implement a divorce regulation proper to a Nordic country in a Mediterranean type of welfare and production. Analysing the Spanish case from a socio-legal perspective, Picontó (2012) suggests adopting a critical distance from imposing shared custody as a preferred model when applied in a society where power relations between members of the heterosexual couple and sharing household tasks and family responsibilities are still distributed asymmetrically.

It seems clear then that we should not think that joint custody in itself is going to help promote uses of a new conceptualisation of the paternal role. The study by Escobedo *et al.* (2012) actually examines and compares Spanish and French cases. These authors conclude that beyond the progressive implantation of this legal

measure, it is key to achieve equal participation in unpaid work of raising and looking after children by men and women, if we are attempting shared parental responsibility in daily practice.

It is interesting to see how in a Nordic setting such as Norway the rights and duties of post-divorce parental responsibility are tied to sharing time and residence. The study by Kitterod and Lyngstad (2012) indicates that shared residence agreements presuppose an equal division of living with the children after divorce as well as father and mother making joint decisions. Both conditions are inseparable within the Norwegian legal framework. A father or mother that does not live alternately with the child cannot make decisions on their life. In the event of having two or more children in their charge, the parents can divide their custody, which we might call distributed custody. In Spain, the possibility of separating siblings is not contemplated apart from in exceptional cases. Furthermore, in Norway, when choosing the shared option, the father and the mother lose the chance to apply for the benefits that are awarded to fathers and mothers with exclusive custody. It might be said that the cultural conditioning factors, as well as public policies on family and child protection, mean that shared residence agreements in Norway happen in just a minority of cases, and cases of paternal sole custody are even rarer. It should be taken into account that this Nordic country is a pioneer in policies for equal parental distribution in the field of paternity leave for childcare. We should also remember that Norway can boast a female employment rate that is almost as high as male employment. However, men still have a greater dedication to paid activities than women in a significant proportion of couples. This gender-imbalanced dedication to professional careers might also appear as a cause that gets in the way of co-parenting projects and cooperative parenting after divorce.

7. Conclusions

It can be concluded that in the light of weakening of marriage and the two-parent model, family law regarding separation and divorce seems to restore the ideal of the primitive opposite sex couple as the founding source of filiation. This ideal symbolically reminds us of the Roman *patria potestas* that goes to great lengths to preserve the recognition of genetic truth, name and residence.

Despite social changes in Spain, it can be stated that childcare falls mainly to mothers and that the model of the father as the only bread-winner prevails in a third of two-parent homes. Firstly, we have looked at sociodemographic changes that have taken place since the democratic transition in the 1980s to the present day. The delay in marriage age and the increase in the divorce rate above the EU average are accompanied by a trend to live together in an androcentric work system that has incorporated many women in a short space of time. However, men's participation in domestic activities has not been balanced in the same way.

Given that more than 40% of births in Spain take place outside wedlock, it is understandable that a large number of fathers need to claim their acknowledgement as such through exercising physical or direct paternal activity. The first law regulating divorce in 1981 broke with absolute paternal power (*patria potestad*) and so parental responsibility has been shared since the return to the democratic system in this country.

Looking at the contrast with other countries, it can be concluded that the actual definition of what the legal joint custody arrangement implies is not easy to translate from one context to another. In the same way, a comparison cannot be established regarding its impact on systems where economic activity by gender and family support policies vary widely. The preference for maternal custody (understood as joint legal custody and mother daily care) of children after divorce was introduced in Spain in 1981 at the same time as shared parental authority when it was already being questioned in countries such as the United States as it did not always coincide

with the child's best interest. In Spain, the content of joint custody necessarily implies a balanced distribution of time for day-to-day care and residence.

The application of the joint custody arrangement that implies shared residence and a balance of time in dedication from both parents is following a constant process of sustained acceleration in Spain. The law applies the principles of co-parenting, along with the principle of the child's best interest, assuming that participation from the father and the mother will be equal. However, the participation data in the family's productive means and time dedicated to domestic tasks and care reveal that participation from the father and the mother is not gender neutral but matches the traditional roles of provider father and nurturer mother.

Joint custody is applied in the child's best interest calling on shared parental responsibility between father and mother. For the Spanish case, this legal norm is being implanted in a cultural system, where emerging configurations exist side by side with quite traditional gender relations. It is possible that this implantation might turn out to be pedagogic for the new generations but it remains to be seen whether the gender gap in dedication to direct childcare will be closed in the future. Some experiences from countries that we take as benchmarks are not particularly optimistic for the time being and talk about a new matrifocality despite legal agreements because it is the mothers, grandmothers and step-mothers that perform the care either directly or indirectly. Co-parenting, as it has been designed, refers to the two-parent nuclear family model and requires cooperation from the parents for an indefinite period of time. The designs were drawn up to perpetuate a two-parent system where other figures do not fit except as third parties, despite the social reality that includes multiple new family configurations.

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